IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## NOS. 04-1056, 04-1057

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PRESTON W. SMALL,

APPELLANT/PETITIONER

V.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

APPELLEE/RESPONDENTS

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ON APPEAL FROM AND PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL COMMUNICATIONS COMMISSION

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

### *A. Parties*

All parties, intervenors, and amici appearing before the Federal Communications Commission and in this Court are listed in the Brief for Appellant/Petitioner Preston W. Small.

### *B. Rulings Under Review*

*Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia),* 16 FCC Rcd 19857 (2001), *reconsid. denied*, 17 FCC Rcd 14830 (2002), *reconsid. denied*, 19 FCC Rcd 1603 (2004) (JA 22, 24, 26).

### *C. Related Cases*

The orders on review have not previously been before this Court. Counsel are not aware of any related cases pending in this or any other Court.

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# TABLE OF AUTHORITIES

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** Authorities principally relied upon are marked with asterisks.*

## GLOSSARY

This brief contains no abbreviations or acronyms that are not part of common usage.

IN THE
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**Nos. 04-1056; 04-1057**

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WNNX LICO, INC.,

INTERVENOR

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ON APPEAL FROM AND PETITION FOR REVIEW OF ORDERS
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BRIEF FOR FCC AND UNITED STATES

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This case arises from a rule making proceeding conducted by the FCC in response to petitions for rule making to modify the allotment of certain FM radio broadcast channels in the areas around Anniston, Alabama and Atlanta, Georgia. The parties who filed the rule making petitions, appellant/petitioner Preston Small and intervenor WNNX Lico, Inc., are licensees of existing FM radio stations in this area who sought mutually exclu-

sive modifications of channel allotments in order to move their respective stations to different locations. The Commission concluded that the modified allotment of channels proposed by intervenor WNNX better served the public interest than that proposed by Small because it would bring a first local radio service to more people, overall radio service to more people and would reduce interference among existing stations.

The issues presented are:

1. Whether Small's petitions for reconsideration directed to the Commission tolled the period for seeking review of the Commission's orders and, if not, whether the Court lacks jurisdiction to consider the notice of appeal and petition for review.

2. Whether the FCC reasonably concluded that the FM channel allotment proposal advanced by WNNX better served the public interest than the mutually exclusive proposal advanced by petitioner Small.

## JURISDICTION

As discussed below, the FCC and the United States contend that the Court lacks jurisdiction because the petition for review and notice of appeal are untimely with respect to the Commission's substantive orders at issue in these cases. Small's second reconsideration petition did not toll the time for seeking judicial review of the Commission's earlier orders in the proceeding at issue in this case. *Midland Coal Co. v. Office of Workers' Compensation*, 149 F.3d 558, 562-64 (7th Cir. 1998). The FCC's final order of January 22, 2004, constituted principally the FCC's denial of Small's second reconsideration petition and refusal to reconsider its earlier orders and to that extent is not itself reviewable. *Sendra Corp. v. Magaw*, 111 F.3d 162, 166 (D.C.Cir. 1997). "[A]n agency's denial of such a request for reconsideration is, under 5 U.S.C. § 701(a)(2), 'committed to

agency discretion by law.' *Brotherhood of Locomotive Engineers*, 482 U.S. at 282, 107 S.Ct. at 2367 (citing *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.21 714 (1985))." *Id.*

If the Court concludes that the petition for review and notice of appeal are not untimely, jurisdiction would exist pursuant to either 47 U.S.C. 402(a) and 28 U.S.C. 2342(1) or 47 U.S.C. 402(b)(6).[1]

## STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

## COUNTERSTATEMENT OF THE FACTS

### *A. REGULATORY BACKGROUND*

At its foundation, this case is principally concerned with the application of Section 307(b) of the Communications Act of 1934, 47 U.S.C. 307(b). That provision directs the FCC to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The Commission adopted a Table of

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[1] The Court has held that 47 U.S.C. 402(a) and 402(b) are mutually exclusive paths of judicial review. *Rhode Island Television Corp. v. FCC*, 320 F.2d 762, 766 (D.C.Cir. 1963). It is sometimes unclear which jurisdictional provision applies. *See Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005, 1008-09 (D.C.Cir. 2001). FCC channel allocation rule making proceedings, which do not themselves involve specific action with respect to permits or licenses, are reviewable pursuant to Section 402(a). *See id.* However, the proceeding in this case also involved a modification of a license, which is specifically covered by either 47 U.S.C. 402(b)(5) or (6). Since Small has sought review under both Sections 402(a) and 402(b), if the Court otherwise has jurisdiction to review the FCC orders at issue here, it should be unnecessary to resolve whether the case is properly before the Court under Sections 402(a) or 402(b). We note that the United States is a respondent only under Sections 402(a) and 28 U.S.C. 2342, and is not a party under Section 402(b).

Allotments in 1962 to aid in carrying out this statutory responsibility in the context of licensing FM radio broadcasting stations. *Revision of FM Broadcast Rules, First Report and Order*, 40 F.C.C. 662, 676 ¶37 (1962). The Table, currently codified at 47 C.F.R. 73.202(b), sets forth the FM radio channels allotted to each state by community. The Table also specifies the "class" of each allotted channel, based on permissible power output and antenna height, which determines each station's service area. *See* 47 C.F.R. 73.210 - 73.211. Because of interference concerns, the location, frequency and class assigned to a given station depend on the location, frequency and class of nearby stations. Channel spacing and minimum distance separation requirements are set forth at 47 C.F.R. 73.207.

Changes to the Table of Allotments are made through rule making proceedings initiated by the FCC or by the filing of a petition for rule making. *See* 47 C.F.R. 1.420. The Commission has established priorities to guide its determination whether an existing versus a proposed arrangement of allotments would better serve the public interest. These priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. *See Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1988). Where there are competing allotment proposals, if one proposal is awarded a higher priority, that ordinarily is dispositive. The Commission does not compare the proposals based on any other considerations. *See Faye & Richard Tuck*, 3 FCC Rcd 5374 ¶¶19-21.

The Commission generally presumes that a station will provide service to its community of license. However, when an applicant seeks an allotment priority preference for proposing to provide a first local radio transmission service to a community of license

that is located within an Urbanized Area, the Commission requires the proponent of that allotment to show that the proposed community of license has an identity independent from the Urbanized Area and is entitled to consideration as a first local service.[2] *See Faye & Richard Tuck, Inc.*, 3 FCC Rcd 5374 ¶¶3-4 (1988)(*"Tuck"*); *see also New Radio Corp. v. FCC*, 804 F.2d 756, 760 (D.C.Cir. 1986); *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33, 35 (D.C.Cir. 1951). The Commission has specified three factors for evaluating a community's independence for this purpose. The most important consideration is the independence of the suburban community from the larger urbanized area. The other two, less important, considerations are (1) the degree to which the proposed station's signal will cover both the suburban community and the larger metropolitan area, and (2) the size and proximity of the suburban community to the central city. *See Tuck*, 3 FCC Rcd at 5377-79 ¶¶28-40.

The Commission specified in the *Tuck* ruling that it would look to eight factors in its analysis of the independence of a specified community from the larger urbanized area: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an

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[2] Previously, the Commission applied presumptions that applicants proposing suburbs of large cities as their communities of license did not intend to serve the needs and interests of the suburban community. Thus, in determining allotment priorities, the Commission considered such proposals to be for the large city rather than the suburban community. The Commission abandoned those policies in 1983 after concluding that they had become counterproductive as they discouraged service to independent suburban communities. *See The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 F.C.C.2d 436, 437 ¶20 (1983).

integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company and its own zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. *Tuck*, 3 FCC Rcd at 5378 ¶36.

The Table of Allotments determines the universe of channels for which applications may be made. With respect to existing stations, the Commission's rules permit an existing licensee to propose a change in the table involving a modification of its station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing applications. *See* 47 C.F.R. 1.420(i); *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870, 4874 (1989), *reconsid. granted in part*, 5 FCC Rcd 7094 (1990). Both Small and WNNX filed their rule making petitions pursuant to this provision. In addition, WNNX proposed to add two new allotments for channels that it indicated it intended to apply for. Other applicants, however, would also be able to apply for licenses on those channels.

## *B. FACTUAL BACKGROUND*

### *1. The Rule Making Proceeding*

#### *a. The Rule Making Petitions*

Petitioner Preston W. Small is the licensee of FM radio station WLRR, which operates on FM Channel 264A and is licensed to Milledgeville, Georgia. In July 1997

Small filed a petition for rule making seeking to substitute a different channel on which station WLRR would operate and to reallot that new channel to Covington, Georgia, where it would be the second local radio service and first local FM radio service. *See* JA 29.

Intervenor WNNX Lico, Inc. was the licensee of FM radio station WHMA, which operated on Channel 263C and was licensed to Anniston, Alabama. In November 1997 WNNX filed a petition for rule making requesting the substitution of a different channel for WHMA and reallotment of the channel to College Park, Georgia, where it would be the first local service. WNNX also requested that two new FM radio channels be allotted to Anniston and Ashland, Alabama. *See* JA 33. The Ashland allotment would be the first local service to that community. WNNX stated that it intended to apply for all three of these channels if its petition were granted.[3] JA 207.

On July 10, 1998, the Commission's Mass Media Bureau, pursuant to delegated authority, released a *Notice of Proposed Rule Making* beginning a proceeding to consider the Small and WNNX rule making petitions. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, College Park, Covington and Milledgeville, Georgia)*, 13 FCC Rcd 12738 (MMB 1998) ("*NPRM*") (JA 1). As the Commission noted, the rule making petitions were "mutually exclusive because

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[3] As indicated above, under the Commission's rules WNNX could apply for the College Park allotment without facing competing applications. However, no such limitations would apply to the new Anniston and Ashland allotments. Under the statute and Commission rules, once a window is opened to accept applications, any qualified party could file an application. If more than one application is filed, the licensee would be selected by auction. 47 U.S.C. 309(j). A window for filing applications to construct stations using these allotments has not yet been scheduled by the Commission.

Covington and College Park are located approximately 76 kilometers apart while the Commission's Rules specify a minimum distance separation of 99 kilometers for first adjacent Class C3 channels." *Id.* at 12739 ¶1 (JA 2).

In response to the *NPRM*, Small filed a counterproposal proposing to reallot the channel for its station to Social Circle, Georgia rather than Covington, Georgia as it had originally proposed. In addition to Small's counterproposal, Small, WNNX, and other parties filed comments in the proceeding. Small, and two other parties who are licensees of existing radio stations in the Atlanta area, opposed the WNNX proposal to reallot the channel from Anniston to College Park on the ground, they argued, that College Park is located within the Atlanta Urbanized Area and is not entitled to a preference in the Commission's scheme of allotment priorities for first local service. *See* Comments of Preston Small, Cox Radio, Inc. and Jefferson Pilot Communications Co. Small and Cox argued for grant of Small's counterproposal. Two other parties, who indicated interest in applying for the two new channels that would be allotted to Alabama communities in the WNNX proposal, supported that proposal, asserting that its grant would lead to new or improved service to areas currently underserved by radio stations. *See* Comments of Brantley Broadcast Associates, Comments of Southern Star Communications.

***b. The Report and Order Modifying the Table of Allotments***

In a *Report and Order* of April 28, 2000, the Commission's Mass Media Bureau concluded that WNNX's proposal would result in a "preferential arrangement of allotments" based on a comparison of the "existing versus the proposed arrangement of allotments using the FM priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1988)." *Amendment of Section 73.202(b), Table of Allot-*

*ments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia)*, 15 FCC Rcd 9971, 9972 ¶5 (2000) ("*R&O*")(JA 10, 11). Specifically, the Bureau concluded that adopting this proposal would provide (1) a net gain of service to a population of approximately 1.7 million persons;[4] (2) first local service to two communities – College Park and Ashland; and (3) elimination of existing interference, or "short-spacing" involving two other stations. *Id.* at 9973 ¶6 (JA 12).[5]

The *Report & Order* recognized that providing a first local service preference for the reallotment of a channel to College Park raised longstanding policy concerns surrounding the potential migration of broadcast stations from lesser served rural areas to well-served urban areas. *R&O*, 15 FCC Rcd at 9973 ¶7 (JA 12). In this case, the Bureau concluded that the allotment to College Park was entitled to a first local service preference under existing agency precedent. In particular, the Bureau found that College Park was independent from Atlanta based on an examination of its local government, local

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[4] The addition of a new channel to College Park would result in new service to 2,133,614 persons. The substitute allotment for Anniston would serve 436,083 fewer persons than the existing Anniston allotment, resulting in a net gain of service to 1,697,531 persons. *See R&O*, 15 FCC Rcd at 9972 ¶6 (JA 11).

[5] The Commission's rules require that FM transmitters be located at specified minimum distances from neighboring FM broadcast stations in order to prevent interference. *See North Texas Media, Inc. v. FCC*, 778 F.2d 28, 30-31 (D.C.Cir.1985). A site that does not meet the minimum separation requirement is "short-spaced." Other than *de minimis* situations, short-spacing typically arises from grandfathering resulting from past changes in the Commission's rules. In addition the Commission's rules provide for the acceptance of an FM application that proposes a short-spaced transmitter site if the application complies with specified contour protection criteria. *See* 47 C.F.R. 73.215; *Short-Spaced FM Assignments Using Directional Antennas* , 4 FCC Rcd 1681 (1989), *on reconsid.*, 6 FCC Rcd 5356 (1991). Here, the changes adopted by the Commission would eliminate a significant 57.1 km short-spacing with one station and a 1.8 km short-spacing with another. *See R&O*, 15 FCC Rcd at 9973 ¶6 (JA 12).

municipal utilities, local businesses, as well as local health, religious and civic organizations. *See id*. at 9974 ¶8 (JA 13).

Upon concluding that WNNX's proposal would constitute a preferential arrangement of allotments as compared to the existing allotment to Anniston, the Bureau then compared the WNNX proposal to the mutually exclusive counterproposal advanced by Small that would replace its existing facility at Milledgeville, Georgia with a new allotment at Social Circle, Georgia. The Bureau found that the WNNX proposal clearly was preferable because: (1) It would provide a first local service to a much larger community. College Park had a population of 20,457, while Social Circle's population was only 2,753. In addition, the WNNX proposal provided an additional first local service to Ashland, Alabama, with a population of 2,034 persons. (2) It would provide a net gain of service to nearly 1.7 million persons, while Small's proposal would result in a net service gain to only 127,069 persons. (3) It would eliminate two short spacings, while Small's proposal offered no such benefits. *R&O*, 15 FCC Rcd at 9975-76 ¶12 (JA 14-15).[6]

Based on these conclusions, the Bureau granted WNNX's rule making petition, substituting a different channel for WHMA's Anniston station, reallotting that channel to College Park and modifying WHMA's license to operate on the new channel in College

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[6] WNNX has constructed the station using the new allotment to College Park and has been operating it since January 2001, using the call sign WWWQ. (For consistency with the Commission's orders, we will continue to refer to the prior WHMA call sign.) WNNX's decision to proceed to implement the reallotment is, of course, subject to the pending review proceeding in this Court and faces the risk that if the Court were to reverse, the licensee ultimately could bear the costs of reversing any action taken in reliance on the order. However, pending the Court's decision in this case, WNNX can rely on the final agency order. *See Amendment of Section 1.420(f)*, 11 FCC Rcd 9501 (1996); 47 C.F.R. 1.420(f), 1.429(k).

Park. In addition, the Commission allotted a new channel to Anniston and to Ashland, Alabama.

### *c. Media Bureau Denial of Small's Reconsideration Petition*

Small sought reconsideration of the *Report & Order*, arguing that the Bureau had failed to discuss adequately his arguments challenging the independence of College Park from Atlanta and whether an allotment to College Park was entitled to consideration as a first local service. Small contended that College Park was not sufficiently independent of Atlanta to be entitled to such consideration and that the Commission should have granted his counterproposal to reallot a channel to Social Circle, Georgia because it was entitled to a higher priority under the Commission's allotment criteria. *See* JA 273. The Bureau denied the reconsideration petition. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia)*, 16 FCC Rcd 3411 (2001) ("*Bureau Recon.*") (JA 18).

The Bureau reiterated the conclusion it had reached in the *Report and Order* that although the new College Park allotment would result in a station providing a strong signal not just to College Park, but to 45% of the Atlanta Urbanized Area, this did not in itself "support a conclusion that College Park is not entitled to consideration as a first local service." 16 FCC Rcd at 3412 ¶6 (JA 19). The class of station involved, the Bureau noted, is a high power classification that "invariably serves a large area," and the Commission had approved in other cases "reallotment proposals encompassing more than 45% of an Urbanized Area." *Id.* (JA 19)(citing cases).

The Bureau also repeated its conclusion that the relative sizes of the population of College Park and Atlanta did not preclude providing a first local service preference for College Park. College Park's population is substantial – 20,457 – and its size relative to Atlanta – 5.2% – had not precluded favorable consideration as a first local service in other situations. 16 FCC Rcd at 3413 ¶6 (JA 19-20)(citing cases).

Finally, the Bureau reaffirmed, in a more specific discussion, its analysis of the "*Tuck*" factors, employed to analyze the independence of the suburban community from a nearby urbanized area. The Bureau found nothing in the reconsideration petition to undermine its prior conclusions that these factors support the reallotment to College Park: (1) College Park has a population of more than 20,000 and a significant number of its residents also work in the community; (2) a newspaper, as well as a cable access channel, a city web site and a city newsletter, cover College Park's residents' needs and interests; (3) record evidence demonstrated that community leaders, residents, and local government and elected officials perceive College Park as a community independent from Atlanta; (4) College Park has an established local government with 325 fulltime employees, a mayor, city manager, city attorney, city clerk, city engineer and city auditor; (5) College Park has its own local telephone directory, post office and zip code; (6) College Park has 802 licensed business establishments as well as its own health facility; (7) local advertisers have newspapers available to them that reach the residents of College Park but which do not serve Atlanta; and (8) College Park provides its own emergency and municipal services – police, fire, public works, electricity and water distribution, sewer system, parks and recreation – and does not rely on Atlanta to provide such services. *See* 16 FCC Rcd at 3413-14 ¶¶8-9 (JA 20-21).

### *2. The Commission's Orders*

Small sought further reconsideration of the Bureau's denial of his first reconsideration petition, arguing once again that the agency had "failed to discuss numerous significant factual and legal issues." JA 335. Small's second reconsideration petition did not purport to raise any new factual or legal issues that were not or could not have been raised in prior pleadings. Pursuant to the agency's rules, the Mass Media Bureau referred Small's second reconsideration petition to the full Commission.[7]

#### *a. Commission Affirmance of the Media Bureau's Report and Order Modifying the Table of Allotments*

The Commission reviewed the Bureau's *Report and Order*, as well as the *Memorandum Opinion and Order* on reconsideration and found "that there are no errors of law or new facts that would warrant reversing the staff action." *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia),* 16 FCC Rcd 19857 ¶1 (2001) (*"FCC Order I"*) (JA 22).

In addition, the Commission distinguished a 1991 ruling, raised by Small in his second reconsideration petition in 2001. In that ruling, the agency's staff denied a channel reallotment proposal filed by the previous licensee of WHMA to reallot the Anniston channel to Sandy Springs, Georgia. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Eatonton and Sandy Springs, Georgia and Anniston and*

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[7] The Commission's rules provide that interested persons may petition for reconsideration of final actions in rule making proceedings and that, in the case of action taken by the agency staff pursuant to delegated authority, "the petition may be acted on by the staff official or referred to the Commission for action." 47 C.F.R. 1.429(a).

*Lineville, Alabama)*, 6 FCC Rcd 6580 (MMB 1991), *app. for rev. dismissed*, 12 FCC Rcd 8392 (MMB 1997), 13 FCC Rcd 2104 (MMB 1998) (*"Eatonton*").

The Commission rejected Small's claim that that ruling supported a finding that College Park is not entitled to a first local service. "Specifically, the earlier Sandy Springs proposal would have resulted in interference to reception of FM radio service by 18,662 persons. Moreover, Sandy Springs was not incorporated, received all of its governmental services from either Atlanta or Fulton County, and many of the Sandy Springs civic organizations listed Atlanta addresses." *FCC Order I*, 16 FCC Rcd at 19857 ¶2 (JA 22-23). By contrast, the Commission pointed out, the College Park allotment met the established criteria "with respect to suburban communities seeking allocation of a first local service," would reduce existing interference to two short-spaced stations and would create no new interference. *Id.*

***b. Commission Denial of Small's Reconsideration Petition***

Small filed a petition for reconsideration (his third, including his two earlier petitions directed to the Media Bureau) of the Commission's action along with a request to reopen the record to consider new evidence. JA 373. Again Small raised no new factual or legal arguments. His request to reopen the record related to WNNX's then pending application to operate a more powerful Class C2 station at the College Park location.[8]

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[8] The Commission's rules currently provide for eight classes of FM stations based on maximum transmitter power and antenna height. *See* 47 C.F.R. 73.211. WNNX pointed out in its opposition to Small's petition that the application to upgrade the class of its College Park station had been filed in January 12, 2001, and Small had had ample opportunity to argue its relevance in his prior reconsideration petition, which had been filed on March 12, 2001. WNNX also noted that Small could have raised any objections in the context of the upgrade application itself, which he had not done. *See* JA 395.

The Commission denied the petition. *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia),* 17 FCC Rcd 14830 (2002) (*"FCC Order II*")(JA 24).

The Commission reiterated that it had found no errors of fact or law in its earlier order or in the two staff orders that would warrant reconsideration of those prior actions. The Commission also found no basis for Small's complaint that he had improperly not been permitted to supplement the record when the Media Bureau referred his second reconsideration petition to the Commission pursuant to specific provisions of the agency's rules. The Commission pointed out that "the referral of a matter to the Commission pursuant to Section 1.106(a) does not create an opportunity for the filing of an additional pleading or 'supplement.' Neither our rules of practice nor other policies authorize such filing." 17 FCC Rcd at 14830 ¶2 (JA 24).

Finally, the Commission held that reconsideration was unavailable under its rules because Small had failed to demonstrate new facts or changed circumstances. 17 FCC Rcd at 14831 ¶2, *citing* 47 C.F.R. 1.106(b)(3), 1.106(k)(3) (JA 24-25). The Commission rejected "as frivolous" Small's claim that the Commission's discussion of the 1991 *Eatonton* ruling in its previous order constituted new facts or changed circumstances that warranted reconsideration. *Id.* at 14830 ¶2 (JA 24).

### *c. Commission Denial of Small's Second Reconsideration Petition*

Once again Small filed a petition for reconsideration and once again included a motion to reopen the record, among other things.[9] JA 422. The Commission denied the petition and motion, again finding "no new facts that would warrant reconsideration of any of our prior orders." *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia),* 19 FCC Rcd 1603, 1604 (2004) (*"FCC Order*

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[9] Actually, following the Commission's denial of his first reconsideration petition and before the agency could act on his second reconsideration petition, Small filed: (1) "Petition for Reconsideration and Second Motion to Reopen the Record" (Aug. 19, 2002) (JA 422); (2) "Motion for Leave to Supplement Petition for Reconsideration and Second Motion to Reopen the Record" (Aug. 22, 2002); (3) "Statement for the Record, Motion for Protection, and Notice of Resubmission of Petition for Reconsideration and Second Motion to Reopen the Record and Notice of Resubmission of Motion to for [sic] Leave to File Supplement" (Sept. 3, 2002) (JA 482); (4) "Motion for Leave to Supplement Petition for Reconsideration and Second Motion to Reopen the Record" (Sept. 3, 2002); (5) "Petition for Reconsideration and Second Motion to Reopen the Record" (Sept. 3, 2002); (6) "Request for Federal Register Publication" (Oct. 3, 2002); (7) "Motion for Leave to Submit Errata to Petition for Reconsideration and Second Motion to Reopen the Record" (Oct. 30, 2002); (8) "Motion for Leave to Submit Information Concerning an Improper *Ex Parte* Communication" (Oct. 30, 2002); (9) "Letter to FCC General Counsel Jane E. Mago" (Nov. 8, 2002); (10) "Reply to Consolidated Opposition to Petition for Reconsideration and Second Motion to Reopen the Record" (Nov. 21, 2002) (JA 493); (11) "Third Motion for Leave to File Supplement" (Dec. 4, 2002); (12) "Fourth Motion for Leave to File Supplement" (Dec. 13, 2002); (13) "Notice of No Response Received to Third and Fourth Motions for Leave to File Supplement and Request for Entry of Adverse Findings Against WNNX Lico, Inc." (Jan. 2, 2003); (14) "Opposition to Motion to File Response" (Jan. 21, 2003) (JA 505); (15) "Reply to Response to Notice of No Response Received to Third and Fourth Motions for Leave to File Supplement and Request for Entry of Adverse Findings Against WNNX Lico, Inc." (Jan. 21, 2003); (16) "Request for Prompt Case Processing and Request for an Order Requiring Clarification of Counsel's Client Representation Status" (June 12, 2003); (17) "Second Request for Prompt Case Processing and Submission of an *Ex Parte* Letter Received by Counsel" (Oct. 15, 2003); (18) "Complaint and Request for Investigation" (Oct. 20, 2003); (19) "Fifth Motion for Leave to Supplement the Record" (Nov. 7, 2003); (20) "Reply to Response to Motion for Leave to File Supplement to Complaint and Request for Investigation" (Nov. 10, 2003); (21) "Second Motion for Leave to File Supplement to Complaint and Request for Investigation" (Nov. 20, 2003); and (22) "Reply to Consolidated Opposition" (Dec.12, 2003). The Commission found that consideration of the matters raised in these supplementary pleadings was "unwarranted." 19 FCC Rcd 1603 at n. 2 (JA 26).

*III*")(JA 26, 27). The Commission reviewed the additional matters raised by Small in his numerous requests to reopen the record and concluded that they "do not require that we revisit either of our previous decisions in this proceeding." *Id.* at 1604 ¶2 (JA 27). The Commission specifically acknowledged Small's claims that (1) WNNX has made a prohibited *ex parte* presentation and that (2) parties not involved in this proceeding had "threatened" him with litigation. The Commission found that neither claim presented circumstances that warranted agency investigation or other action. *Id.* The Commission emphasized that it "is not required to entertain redundant pleadings," noting the Court's observation that "'the Commission need [not] allow the administrative process to be obstructed or overwhelmed by copious or purely obstructive protests.'" *Id.* at 1604 ¶3, *quoting Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1005 (D.C.Cir. 1969) (JA 27).

This appeal and petition for review followed.

## SUMMARY OF ARGUMENT

The Court lacks jurisdiction to consider these cases because the petition for review and notice of appeal are untimely with respect to the Commission's substantive orders at issue in this case. Small's second reconsideration petition did not toll the time for seeking judicial review of the Commission's earlier orders because it was not based on new facts or changed circumstances related to those orders. Moreover, the Commission's denial of Small's first reconsideration petition did not reopen the proceeding so as to permit a second reconsideration petition to have a tolling effect. Insofar as Small claims to have presented new facts in his second reconsideration petition, those new facts on their face had no bearing on the matter decided by the Commission in the earlier orders – the public interest basis for realloting the Anniston channel to College Park – and thus did not give the second petition tolling effect. The Commission reasonably rejected the new facts argued by Small in his second order on reconsideration, which he presents in only a fleeting manner in his brief.

The Commission reasonably concluded, based on an ample record and well established criteria, that the proposal to reallot the Anniston channel to College Park was in the public interest and was preferable to Small's mutually exclusive proposal to reallot the channel on which he operates to another community also closer to Atlanta. The signal coverage of the Atlanta area by a station allotted to College Park, as well as College Park's relative size and location with respect to Atlanta, were consistent with granting a preference to College Park for first local service based on numerous agency precedents. Record facts, largely unchallenged by Small, also support the Commission's conclusion that College Park is independent from the Atlanta Urbanized Area for purposes of the

Commission's FM allotment priorities, which also supports the Commission's conclusion that WNNX's proposed allotment to College Park was entitled to a first local service preference. Virtually all of the criteria that the Commission routinely considers in making determinations where a proposed allotment is for a suburban community located in an urbanized area supported the Commission's determination as to College Park's independence.

Commission precedent demonstrate that a record such as existed in this case warrants a determination that an allotment is entitled to a first local service preference. In this case, that preference was not dispositive but simply ensured that the College Park allotment proposal would be compared to Small's proposal to provide first local service to another community. The Commission's overall comparison of the proposals, which Small does not challenge, clearly showed the College Park proposal to provide greater public interest benefits in that it provided first local service to two communities, provided additional service to significantly more people and eliminated existing interference with two stations.

## ARGUMENT

### *I. STANDARD OF REVIEW*

The Administrative Procedure Act provides that a court must uphold a federal agency's action unless that action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). The Court has held that such review is "tolerant"[10] and "highly deferential," and "presume[s] the validity of agency

[10] *Sarasota-Charlotte Broadcasting Corp. v. FCC*, 976 F.2d 1439, 1442 (D.C.Cir. 1992).

action."[11] "The court must determine whether the agency has articulated a 'rational connection between the facts found and the choice made,'" and the Court may "reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment."[12]

### *II. THE COURT SHOULD DISMISS FOR LACK OF JURISDICTION.*

The jurisdictional issues presented by this case, and highlighted in the Court's order of September 22, 2004 directing the parties specifically to address in the briefs the Court's jurisdiction, involve two inter-related questions: (1) whether either of Small's two reconsideration petitions directed to the Commission tolled the time for seeking review of the Commission's prior order affirming the Media Bureau's reallotment action, and (2) whether the Commission orders denying those two reconsideration petitions are themselves unreviewable as actions committed to agency discretion.

The Court has jurisdiction to review final FCC orders pursuant to the APA, 5 U.S.C. 704, the Communications Act, 47 U.S.C. 402(a), 402(b), and the Hobbs Act, 28 U.S.C. 2342(1). The Court's jurisdiction must be invoked by the filing of a notice of appeal or petition for review within thirty or sixty days of that final agency action, depending on which jurisdictional provision applies. 47 U.S.C. 402(c), 28 U.S.C. 2344.

The Communications Act provides that a party to a proceeding "may petition for reconsideration" and that the Commission "in its discretion, [may] grant such a recon-

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[11] *Kisser v. Cisneros*, 14 F.3d 615, 618 (D.C.Cir. 1994).

[12] *Id.* at 619, *citing Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974) and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971). *See Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C.Cir. 2003).

sideration ….” 47 U.S.C. 405. The filing of a reconsideration petition, however, “shall not be a condition precedent to judicial review … except where the party seeking such review … relies on questions of fact or law upon which the Commission … has been afforded no opportunity to pass.” *Id.* The Commission’s rules provide procedures implementing these statutory provisions. *See* 47 C.F.R. 1.429.

If a party files a timely request for reconsideration of a final agency order, the general rule is that such a filing “will suspend the running of the period within which an appeal may be taken, and … this period begins to run anew from the date on which final action is taken on the petition or motion, whether it be denied or granted.” *Los Angeles SMSA Ltd. Partnership v. FCC,* 70 F.3d 1358, 1359 (D.C.Cir. 1995). *See also ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284 (1987)(same in context of Hobbs Act petitions for review).

No court decisions appear to address the question of the tolling effect of multiple reconsideration petitions in the context of the Communications Act. However, the Court has held that under the APA, “[w]hile an agency’s first refusal to grant reconsideration may be reviewable in limited circumstances, its denials of successive requests for reconsideration of the same decision are not. Whether an agency should even respond to such entreaties is ‘committed to agency discretion by law,’ and therefore not subject to judicial review.” *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C.Cir. 1997), *quoting*, 5 U.S.C. 701(a)(2); *see also Egan v. U.S. Agency for International Dev*., 381 F.3d 1, 5 (D.C.Cir. 2004)(same). In addition, the Seventh Circuit has held that the “filing of the second request to reconsider would merely toll the time to appeal the denial of the first request for reconsideration. … Only the final, non-interlocutory decision on the merits is

appealable to this court. Once 60 days expires after the original decision, or after the first denial of reconsideration, this court has no jurisdiction over an appeal." *Midland Coal Co. v. Office of Workers Comp.*, 149 F.3d 558, 563 (7th Cir. 1998). The court added that the "'time limit would be a joke if parties could continually file new motions [for reconsideration], preventing the judgment from becoming final.'" *Id.* at 564, *quoting Charles v. Daley*, 799 F.2d 343, 347 (7th Cir. 1986).

In addition, the Commission's rules envision that a party ordinarily may file only one reconsideration petition in a rule making proceeding: "Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious." 47 C.F.R. 1.429(i)(emphasis added); *see also* 47 C.F.R. 1.106(k)(3) (same in non-rule making matters).[13] Neither the Bureau reconsideration order, nor any of the FCC's three orders in this proceeding modified the rule change adopted in the Bureau *Report and Order*.

Within this framework, Small's first reconsideration petition (JA 373), filed in December 2001, seeking reconsideration of the Commission's November 2001 order (JA 22), tolled the time for seeking review of that order.[14] However, Small's first reconsid-

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[13] Small's characterizes the Commission's rules against second reconsideration petitions in the following manner: "[[T]he rule 'explicitly states that further reconsideration is available, subject to dismissal for repetition,' even if the initial order is unaltered …." Br. at 12 (quoting one of his own pleadings). Small's characterization reflects a significant misunderstanding of the applicable rule, the actual language of which is quoted in the text above.

[14] An argument might be made that unless Small's first reconsideration petition relied on "questions of fact or law upon which the Commission … has been afforded no opportunity to pass," the filing of the petition was not a "condition precedent" to judicial review. 47 U.S.C. 405.

*(continued on following page)*

eration petition relied on no new facts or changed circumstances. He argued (1) that the Commission "did not properly analyze" the *Eatonton* ruling and that the Bureau's analysis of College Park's independence from the Atlanta Urbanized Area was erroneous; (2) that the Commission ignored WNNX's application to upgrade the College Park allotment to a class of station that would permit higher power operation; and (3) that Small's due process rights had been violated when his petition for reconsideration directed to the agency's staff had been referred to the Commission without giving him an opportunity to file supplemental information. *See* JA 373. The first argument is an undisguised attempt to reargue matters that had been addressed repeatedly in the comments and the Commission's initial order. The second argument does not involve changed circumstances. As we have noted, WNNX's January 2001 upgrade application had been filed prior to Small's March 2001 second reconsideration petition directed to the Bureau, but Small did not mention the upgrade application in his March 2001 pleading. *See* n. 8 above. Moreover, Small filed no opposition to the upgrade application itself, thus waiving a second opportunity to raise this issue before the Commission.

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Thus, Small was not "otherwise expressly required by statute" (5 U.S.C. 704) to seek reconsideration, and the Commission's November 2001 order became final for purposes of seeking judicial review. However, the Court's decision in *Locomotive Engineers* seems to have rejected such an approach, apparently holding that the "otherwise expressly required" language of the APA operates "merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review (unless, of course, specifically required to do so by statute …), but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal. *See* 482 U.S. at 284-85; *see also Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593, 597 (D.C.Cir. 1997)(declining, in context of a first reconsideration petition, to make exception to tolling rule for repetitious reconsideration petitions). However, the Court need not reach that question, since, as discussed below, there is no basis to find that Small's second reconsideration petition tolled the applicable limitations period, and therefore his notice and petition are untimely for that reason.

Nor can Small's claim with respect to the referral of his reconsideration petition to the Commission satisfy the new evidence or changed circumstances standard. Small himself recognized when he filed the reconsideration petition that the Bureau had authority to refer it to the Commission. *See* JA 338. Small had the opportunity in the petition to include whatever arguments he believed necessary to make his case, whether heard by the Bureau or the Commission. There is no basis for him to later claim that the Bureau's referral of his petition to the Commission, which he had expressly anticipated, somehow constituted new or changed circumstances that justified further agency consideration of his claims.[15]

Since Small's first reconsideration petition directed to the Commission thus did not rely on new facts or changed circumstances, the Commission's order denying the petition was not an independently reviewable action. *Sendra*, 111 F.3d at 166. The effect of the first reconsideration petition was simply to toll the time for judicial review.

Small's second reconsideration petition directed to the Commission, filed in August 2002 (JA 422), does not have the same tolling effect with respect to judicial review of the November 2001 order. It is at least open to question whether a second petition seeking reconsideration of an agency's unreviewable action denying a first reconsideration petition could ever have a tolling effect with respect to judicial review.

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[15] Aside from Small's earlier failure to argue that his reconsideration petition should not be referred to the Commission, the argument is clearly erroneous. As the Commission correctly held, its rules expressly provide that the agency's staff may act on a petition for reconsideration itself or refer it to the Commission for action, but such referral "does not create an opportunity for the filing of an additional pleading or 'supplement.'" *See FCC Order II*, 17 FCC Rcd at 14830 ¶2 (JA 24).

However, Small's second reconsideration petition cannot have a tolling effect in this case.

This petition did not invoke any new evidence or point to any changed circumstances since the filing of the first petition. Instead, it was taken up almost entirely with an even more extended reargument directed to the claimed error by the Commission in its treatment of the *Eatonton* ruling. *See* JA 464-476. The *Eatonton* matter, involving the unsuccessful effort of the prior licensee to have the Commission reallot WHMA's Anniston channel to another community in Georgia (*see* p.14 above), had been raised repeatedly by Small since the very beginning of this proceeding. Indeed in the very first filing he made following the release of the *Notice of Proposed Rule Making*, Small claimed that the *Eatonton* ruling called for the rejection of WNNX's reallotment proposal. *See* JA 157-159. Reliance on a ten-year-old agency ruling cannot possibly constitute new facts or changed circumstances that would warrant the Commission entertaining a second reconsideration petition.

Beyond the repetition of his arguments based on the *Eatonton* ruling, Small's second reconsideration petition merely reiterates virtually verbatim his complaint, raised in his previous reconsideration petition (JA 379), that he had been denied an opportunity to present his "whole case" because the Media Bureau, to which his second petition for reconsideration was directed referred this petition to the Commission for resolution. *See* JA 457-463. [16]

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[16] The petition also contained a brief and confusing claim that Small had been "threatened with a $10 million law suit if he continued to litigate his position in this case." (JA 456). The petition provided as support for this claim only a vague affidavit from Mr. Small that failed even to allege that WNNX had any connection to the claimed threat or to demonstrate that, even if the

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Even if the petition for reconsideration itself does not present the agency with new facts or changed circumstances, the agency of course could choose to reopen a proceeding on reconsideration and issue a new order. If the agency does that, such action can start the running of a new limitation period for judicial review. *See Sendra*, 111 F.3d at 167 (citing cases). However, as the Court has held, "[o]nly 'when the agency has clearly stated or otherwise demonstrated,' that it has reopened the proceeding will the resulting agency decision be considered a new final order subject to judicial review under the usual standards." *Sendra*, 111 F.3d at 167, *quoting Morris v. Sullivan*, 897 F.2d 553, 558 (D.C.Cir. 1990). The Commission's order denying Small's first reconsideration petition cannot reasonably be read to have reopened the reallotment proceeding. Small's contention (Br. at 8), that "[t]he rulemaking was reopened" by the Commission is baseless. To the contrary, the order summarily concludes that "there are no errors of law or new facts that would warrant reconsideration," that Small's petition sought merely "to reargue the relevance of [the *Eatonton*] case," and that the petition had "failed to demonstrate new facts or changed circumstances." *FCC Order II*, 17 FCC Rcd at 14830-31 ¶¶1, 2 (JA 24, 25).

To the extent that either of the Commission's reconsideration orders contained any discussion, it was simply to explain the denial of Small's claims and not to reopen the proceeding. *See FCC Order II*, 17 FCC Rcd 14830 ¶2; *FCC Order III*, 19 FCC Rcd 1603 ¶2 (JA 25, 27). "That the agency discusses the merits at length when it denies a request

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threat of such litigation had been made, it was improper. *See* Record App. to Resp. Brief at 1. The Commission acknowledged Small's claims but found them to provide no basis for any agency action. *See FCC Order III*, 19 FCC Rcd at 1604 ¶2 (JA 27).

for reconsideration does not necessarily mean the agency has reopened the proceedings." *Sendra*, 111 F.3d at 167. "[U]nless the agency clearly states or indicates that it has reopened the matter, its refusal of a request for reconsideration will be treated as simply that." *Id.*

Small appears to assert in his brief that any reconsideration petition tolls the time for filing a petition for judicial review of all orders in the subject proceeding regardless of how many times a party may seek reconsideration, citing a number of cases that allegedly support that proposition. *See* Br. at 11-12. In the first place, none of the opinions in those cases addresses the issue of the court's jurisdiction. It is well established that "'[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984), *quoting Hagans v. Lavine,* 415 U.S. 528, 533 n. 5 (1974); *see also Haitian Refugee Center v. Gracey*, 809 F.2d 794, 801 (D.C.Cir. 1987)(same). Moreover, the cases cited by Small either (1) do not involve second reconsideration petitions at all;[17] (2) arose from circumstances in which the Commission had clearly reopened a proceeding by, for example, modifying rules adopted in earlier orders;[18] or (3) the reconsideration petitions had legitimately relied on new or changed circumstances.[19]

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[17] *See, e.g., 21st Century Telesis v. FCC*, 318 F.3d 192 (D.C.Cir. 2003)(only a single petition for reconsideration directed to the Commission).

[18] *See, e.g., AT&T Corp. v. FCC*, 113 F.3d 225 (D.C.Cir. 1997)(FCC had modified rules in acting on reconsideration petition); *United States Cellular Corp. v. FCC*, 254 F.3d 78 (D.C.Cir. 2001)(same)

[19] *See, e.g., Saco River Cellular v. FCC*, 133 F.3d 25 (D.C.Cir.), *cert. denied*, 525 U.S. 813 (1998)(second reconsideration petition relied on newly enacted statutory amendment)

Small contends that he was required to file multiple petitions for reconsideration in this matter because the "longstanding and unforgiving *FCA* exhaustion requirement is that the Commission must be given a 'fair opportunity' to address issues before appellate review." Br. at 10; *see also* Br. at 14.[20] Small had a full opportunity to raise any issue in his first reconsideration petition in order to meet this requirement of Section 405 of the Communications Act. The interest of finality calls for rejection of a claim that Section 405 gives parties the right to file further reconsideration petitions that make new arguments unconnected to any new facts or changed circumstances which continue the tolling period for judicial review. Otherwise, the prospect is for essentially unlimited reconsideration petitions from a party with sufficient inventiveness to continue to come up with new arguments not "previously argued," regardless of whether those arguments are based on new facts or changed circumstances.

The Court's decision in *Southwestern Bell Tel. Co. v. FCC*, 116 F.3d at 596-97, does not call for a different conclusion as to the tolling effect of Small's second reconsideration petition. That case, in the first place, involved an initial petition for reconsideration, not a second petition. Second, that initial petition had been dismissed as repetitious, a result which, in the Court's view, a party seeking reconsideration "may not

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[20] As noted (*see* n. 16 above) Small's second petition did present one new claim – that a state "civil action" had been "threatened" against him (JA 446-49) if he continued to pursue his position in this rule making proceeding, a claim that barely receives mention in his brief. Even if there were basis for that claim, it would, at most, only raise a potential question as to who should be the licensee of the channel to be moved from Anniston to College Park. It had nothing to do with the substance of the Commission's public interest determination regarding the allotment to College Park. A second reconsideration petition, even if based on new facts, should not toll the time for judicial review if those new facts are unrelated to the agency's prior decision.

always be able to anticipate." *Id.* at 597. Finally, the Court determined that in the circumstances of that case, finding that the initial petition did not toll the time for review could discourage a party "from seeking reconsideration before the agency lest it lose the opportunity thereafter to seek judicial review." *Id.* Here the case against tolling is much stronger – this is a second petition, and the Commission's rules, as noted above, specify the circumstances in which a second reconsideration petition will be entertained in a rule making proceeding – circumstances that do not exist here. Small should have had no difficulty anticipating that his second reconsideration petition did not satisfy Section 1.429(i) of the Commission's rules.

Moreover, unnecessarily discouraging parties from filing one reconsideration petition presents legitimate policy concerns for both the agency and the Court. Both the Court and the agency might benefit if arguments against the result reached in an initial agency order, even if not based on new facts or changed circumstances, are first presented to the agency before judicial review. Discouraging second reconsideration petitions, however, in the absence of the agency's reopening of a proceeding or the existence of new or changed circumstances does not present similar concerns. *See Midland Coal*, 149 F.3d at 564 ("'time limit would be a joke if parties could continually file new motions [for reconsideration], preventing the judgment from becoming final.'"). After one reconsideration petition, the interest in finality should prevail.

Accordingly, the time for seeking review of any orders in this proceeding prior to the Commission's second reconsideration order expired 30 or 60 days (depending on whether 47 U.S.C. 402(a) or 402(b) is applicable) following the Federal Register publication of the first reconsideration order – *FCC Order II*, 17 FCC Rcd 14830, 67 Fed.

Reg. 55729 (Aug. 30, 2002)(JA 24). However, Small did not file his notice of appeal and petition for review in this Court until February 19, 2004, nearly 18 months after the publication of that order. The time limit for seeking judicial review is "jurisdictional and unalterable." *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 389 (D.C.Cir. 1974). The notice of appeal and petition for review should, therefore, be dismissed as untimely as to those orders.

Small's notice of appeal and petition for review were timely as to the Commission's second reconsideration order that was published in the Federal Register on February 11, 2004. *See FCC Order III*, 19 FCC Rcd 1603, 69 Fed.Reg. 6582 (Feb. 11, 2004)(JA 26). However, that order principally denied Small's second reconsideration petition. "[A]n agency's denial of such a request for reconsideration is, under 5 U.S.C. § 701(a)(2), 'committed to agency discretion by law.' *Brotherhood of Locomotive Engineers*, 482 U.S. at 282, 107 S.Ct. at 2367 (citing *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 1656, 84 L.Ed.2d 714 (1985))." *Sendra Corp.* 111 F.3d at 166. The notice of appeal and petition for review should, therefore, be dismissed as to the Commission's final order because it is unreviewable.

Insofar as Small's "threatened civil action" claim is based on new facts, making the second reconsideration order reviewable to the extent of the Commission's action on that claim, the agency's rejection of Small's argument was well within the "clearest abuse of discretion" standard that would be applicable. *Sendra*, 111 F.3d at 166; *see* pp 43-44 below. However, as noted above (*see* n. 20), the threatened civil action claim should not be viewed as giving Small's second reconsideration petition a tolling effect as to judicial review of the FCC's initial order.

## *III. THE COMMISSION REASONABLY CONCLUDED THAT GRANT OF WNNX'S PROPOSED CHANNEL REALLOTMENT WAS IN THE PUBLIC INTEREST AND PREFERABLE TO SMALL'S CONFLICTING PROPOSAL.*

In determining that grant of WNNX's proposed reallotment of FM radio channels was in the public interest and was preferable to Small's mutually exclusive proposal, the Commission considered a number of factors based on established agency policy: (1) WNNX's proposal would provide a net gain in service to nearly 1.7 million persons. (2) It would provide a first local service to two communities – College Park, Georgia and Ashland, Alabama. (3) It would eliminate existing interference involving two other radio stations. On review, Small challenges only the conclusion that grant of the WNNX proposal should have been given a preference for providing first local service to College Park. Small argues that because College Park is within the Atlanta Urbanized Area WNNX was not entitled to credit for providing a first local service to College Park. Small contends that the Commission failed adequately to analyze the relevant considerations and misapplied its precedent applicable to such situations. If Small's position had been accepted by the Commission, his proposal for an allotment to provide a first local service to Social Circle, Georgia likely would have been found dispositive under the Commission's allotment priorities adopted pursuant to 47 U.S.C. 307(b). In that case, the Commission would not have engaged in a comparison of the proposals and thus would not have reached other considerations involving gains in service and additional allotments that were contained in WNNX's College Park proposal. *See Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C.Cir. 1989).

### *A. College Park's Independence From Atlanta*

Small does not dispute that the proper inquiry when a reallotment proposal results in the station serving a portion of an urbanized area, as WNNX's proposal did, is "the extent the station will provide service to the entire Urbanized Area, the relative population of the suburban and central city, and, most importantly, the independence of the suburban community." *R&O*, 15 FCC Rcd at 9973 ¶7 (JA 12), *citing Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C.Cir. 1951); *RKO General, Inc.*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). In the orders below, the Commission correctly applied these factors and fully discussed the facts that led to its finding that College Park is an independent community entitled to a preference for its first local service as proposed by WNNX.

#### *1. Signal Coverage and Relative Population Sizes*

Small erroneously claims that the "*Orders on Review* fail to discuss WNNX's substantial coverage of Atlanta. Br. at 26. In fact, the Commission recognized and provided ample discussion of the signal coverage proposed by WNNX for the College Park allotment. *See Bureau Recon.*, 16 FCC at 3412 ¶6; *R&O*, 15 FCC Rcd 9973 ¶7 (JA 19, 12). The Commission found that the proposed coverage of the Atlanta Urbanized Area "does not support a conclusion that College Park is not entitled to consideration as a first local service," and cited a number of other circumstances in which it had approved reallotment proposals in which the signal encompassed significantly more of the urbanized area than proposed by WNNX. *See Bureau Recon.*, 16 FCC at 3412 ¶6 (JA 19).

Similarly, the Commission directly addressed the fact that College Park's population of 20,457 persons is only 5.2% of the population of Atlanta, concluding that College Park's population "is substantial and supports a preference for College Park as a first

local service" and that a 5.2% ratio of relative population sizes between the suburban community and the central city "has not precluded favorable consideration as a first local service." *See Bureau Recon.*, 16 FCC at 3413 ¶6 (JA 20)(citing cases).

***2. The "Tuck" Factors***

As noted earlier, the Commission has set out a number of factors that it would consider in assessing the community's independence from the urbanized area in situations such as WNNX's petition to reallot the Anniston channel to College Park. *See* pp. 5-6 above. The Commission, however, has never held that each factor must be addressed in detail in every case or that each factor must be satisfied in every case. In other situations where, as here, the evidence of the community's independence is substantial, satisfaction of a majority of these factors has been found sufficient to support a conclusion that a preference for first local service is warranted. *See, e.g., Kileen and Cedar Park, Texas*, 15 FCC Rcd 1945 ¶12 (MMB 2000); *Pleasanton, Bandera, Hondo and Schertz, Texas*, 15 FCC Rcd 3068 ¶9 (MMB 2000); *Marysville and Hilliard, Ohio*, 14 FCC Rcd 18943 ¶13 (MMB 1999); *Malvern and Bryant, Ark.*, 14 FCC Rcd 3576 (MMB 1999); *Parker and Port St. Joe, Florida*, 11 FCC Rcd 1095 ¶9 (MMB 1996).

Based on these well-established factors, the Commission reasonably concluded that "College Park is not dependent upon the Urbanized Area for its existence." *R&O*, 15 FCC Rcd at 9974 ¶8 (JA 13). The Bureau summarized the factual bases for its conclusion:

> College Park is a member of the Georgia Municipal Association and has an elected mayor, four elected city council members, and a city manager. The College Park city government, with 297 fulltime employees, includes a police department, a fire department, a department of public works, and a recreation department. In addition to its own local taxing authority, College Park has its own city judge and a code enforcement officer who enforces

> the city's zoning, building, electric, plumbing and other municipal codes. College Park operates its own electrical and water distribution systems, a sanitary sewer collection system, as well as municipal parks and recreation facilities including a municipal golf course. College Park has its own zip code and a local post office. Along with 802 licensed business establishments and its own health facility, College Park has its own religious and civic organizations. While College Park does not have its own local newspaper, local news and advertising is provided by The South Fulton Neighbor which specifically excludes Atlanta.

*Id.* The record provided ample support for these conclusions. *See, e.g.*, JA 43-51, 183-204. Small generally does not dispute these record facts in his brief.

In response to Small's reconsideration petition, the Bureau re-evaluated the issue of College Park's independence with a specific factor-by-factor analysis and reached the same conclusion – that College Park is sufficiently independent from the Atlanta Urbanized Area in order to justify a preference for the WNNX reallotment proposal for first local radio service. *See Bureau Recon.*, 16 FCC Rcd at 3413-14 ¶¶6-9 (JA 19-21).

In his brief, Small now inexplicably claims that these factors for assessing independence of a suburban community that have been employed by the Commission in scores of cases are, apparently, irrelevant because they "determine whether College Park existed as an identifiable community for allocation purposes rather than whether the community of College Park has an economic relationship with the rest of the Atlanta Urbanized Area." Br. at 23.[21] Beyond numerous quotations from arguments in his own administrative pleadings, Small offers no basis for this claim.

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[21] The Commission only allots channels to specific communities, which it generally defines as an identifiable population grouping with common local interests. *See, e.g. Penacock, New Hampshire*, 2 FCC Rcd 459, 460 (MMB 1987). There was no allegation in this proceeding that College Park did not meet the definition of community.

Small specifically contends that the Commission's analysis of factors involving "perceptions, elected officials, telephone directory, zip code, municipal services, zoning/ building/ plumbing codes" do "not examine interdependence, but explore[] 'community' existence." Br. at 37. However, the Commission has taken account of these factors in scores of cases since they were first articulated in the *Tuck* ruling in 1988.[22] They are, on their face, rational considerations to determine a suburban community's independence from the larger urbanized area in which it is located. The record contains ample support with respect to each factor.[23] That consideration of these factors could also serve in examining whether an area is a "community" for purposes of receiving a broadcast station allotment at all, does not demonstrate that the same factors could not rationally be considered to demonstrate the community's independence from the urbanized area. Small cites no precedent to support his contention that these factors are irrational or otherwise arbitrary and capricious as applied in this case.

Although Small dismisses, essentially without discussion, the factors of local government and municipal services, the Commission has held that these are among the most important considerations in demonstrating a community's independence because "residents have determined not only to be self-governing by electing a mayor and council, but also not to be interdependent by paying for their own municipal services." *Mullins and Briarcliffe Acres, South Carolina*, 14 FCC Rcd 10516 ¶3 (MMB 1999); *see also*

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[22] *See, e.g., Seymour and Sellersburg, Indiana*, 19 FCC Rcd 15312 (MB 2004); *Pleasanton, Bandera, Hondo and Schertz, Texas*, 15 FCC Rcd 3068 (MMB 2000); *Marysville and Hilliard, Ohio*, 14 FCC Rcd 18943 (MMB 1999); *Parker and Port St. Joe, Florida*, 11 FCC Rcd 1095 (MMB 1996).

[23] *See, e.g.*, JA 43-51, 183-204.

*Olney, Archer, Denison-Sherman and Azle, Texas*, 13 FCC Rcd 18920 ¶7 (MMB 1998). The record provides strong support for the Commission's conclusion that College Park's substantial local government and provision of municipal services demonstrate independence from the larger Atlanta metropolitan area. *See, e.g.*, JA 47-50, 84, 201-202, 212, 216.

Insofar as he complains (Br. at 29) that the Commission failed to weigh the "Tuck" factors, Small does not explain in what respect the claimed improper weighing led to an arbitrary and capricious result. As we have noted, clear agency precedent holds that a favorable showing on a majority of the analytical factors will warrant a finding of independence. Here the record provided very strong support on all of the factors except existence of a local newspaper or other media and existence of separate advertising markets. Small cites no precedent to suggest that unfavorable or weak showings on those factors could outweigh strong showings on the other six.

To the extent that Small's brief contains a discussion of the specific factors relied on by the Commission, his arguments amount to little more than a disagreement with the Commission's judgment as to whether the largely undisputed facts support a conclusion that College Park is sufficiently independent from the Urbanized Area. For example, Small contends (Br. at 35-36) that work patterns do not support a finding of independence, largely because, Small claims, 33,000 people work at the Atlanta airport, part of which is located in College Park, and "there are only 20,000 people who live in College Park." A comparison of the number of people who work at the airport with the population of College Park has nothing to do with the Commission's analysis of work patterns. What the Commission found was that at least 16% of the residents of College Park work in that

community. The Commission determined that number to be sufficient for it to conclude that work patterns supported a finding of independence of College Park. *Bureau Recon.*, 16 FCC Rcd at 3413 ¶7 (JA 20). That determination is supported by precedent cited by the Commission, and Small suggests no precedent or reasoning to compel a conclusion that it was arbitrary and capricious. *See id., citing Coolidge and Gilbert, Arizona*, 11 FCC Rcd 3610 ¶4 (MMB 1996) (13% of community's population worked in community).

Focusing again on the airport, Small contends that the "most stunning exclusion of substantial evidence from the *Tuck* analysis was the exclusion of the airport because '[n]o resident of College Park lives at the Airport.' … The *Orders on Review* do not explain the rationality of excluding the Airport from an economic analysis merely because no one 'lives at the airport.'" Br. at 30, *quoting Bureau Recon.*, 16 FCC Rcd at 3414 n.4 (JA 21). It has never been clear from Small's pleadings why he finds it significant that part of the Atlanta airport is located in College Park.[24] The Commission's reference to the fact that no College Park resident lives at the airport was simply a response to Small's contention (JA 281) that the Commission should give weight to the fact that the City of Atlanta, rather than College Park, provides municipal services to the Atlanta airport. The Bureau reconsideration order disagreed that Atlanta's provision of municipal services supports a contention that College Park is dependent on Atlanta because "[n]o resident of College Park lives at the Airport" and "there is nothing in the record of this proceeding indicating

[24] WNNX observed below that "[t]o the extent that Opponents assert that the City of College Park would not exist without Atlanta or the airport, the Commission must take note of the fact that College Park was incorporated in 1896, over 100 years ago …." JA 203.

that the City of Atlanta provides any municipal services to College Park." 16 FCC Rcd at 3414 n.4 (JA 21).

Small also claims, again quoting his own administrative pleadings, that the "*Tuck* 'requirement is for the proposed community to have a newspaper, the requirement is not that a neighboring community have a newspaper.'" Br. at 36. There is no such "requirement" – rather the Commission has indicated that it will consider "whether the smaller community has its own newspaper or other media that covers the community's' local needs and interests." *Tuck*, 3 FCC Rcd 5374 ¶36. What the record demonstrated here was that a local newspaper, while not published in College Park, had editorial and advertising content directed to the need and interests of College Park residents, in addition to other suburban communities, and did not focus on Atlanta. *See, e.g.*, JA 293-94. The Commission acknowledged the limited weight of the factual record on this point, but concluded nevertheless that it was favorable for a finding of independence because the paper "does provide an outlet for College Park by publishing College Park news, sports, advertising, public meetings and College Park legal notices." *Bureau Recon.*, 16 FCC Rcd at 3413 ¶7 (JA 20). The Commission gave weight to a local cable access channel, a city web site and a newsletter published by the city recreation department as further evidence of media that covers the community's needs and interests independently of Atlanta or the remainder of the urbanized area. Again, Small offers no reasoning or precedential support for his claim that the Commission's conclusions with respect to this factor were unreasonable.

Small's claim (Br. at 38) that the Commission failed to discuss that "College Park is part of the Atlanta Arbitron advertising service area" again misses the point. Consideration of a suburban community's independence does not require a showing that it is

completely independent in every respect. If that were the case, an applicant desiring to serve a suburban community would never be able to demonstrate an entitlement to a first local service preference. That is not the Commission's policy. *See Marysville and Hilliard, Ohio*, 14 FCC Rcd 18943 ¶8 (MMB 1999)(approving reallotment proposal despite finding that the suburban communities and central city "are considered as sharing the same advertising market"). What the Commission did find here, which is supported in the record, is that a local newspaper is published in a nearby community that provides news coverage and advertising directed to College Park and that excludes Atlanta. This conclusion weighed in favor of a finding of independence for College Park, even if it was not weighed heavily. *Bureau Recon.*, 16 FCC Rcd at 3413 ¶7 (JA 20); *see* JA 284.

***B. The Eatonton Ruling***

Small claims that the Commission improperly failed to apply a precedent in which an earlier proposal by a previous licensee of WHMA to move the Anniston allotment to a community, Sandy Springs, Georgia, closer to Atlanta was denied by the Commission. *See* Br. at 32-34, *citing Eatonton*, 6 FCC Rcd 6580. The relevance of the earlier effort to move the Anniston allotment was first raised by WNNX itself in its original petition as well as in its reply comments. JA 37-40; 179-181. It was also addressed in the *NPRM*. *See* 13 FCC Rcd at 12738 n. 2 (JA 1). The Commission fully explained, in ruling on Small's second petition for reconsideration of the Bureau's order, why the *Eatonton* ruling was distinguishable and did not call for rejection of the College Park proposal. "Specifically, the earlier Sandy Springs proposal would have resulted in interference to reception of FM radio service by 18,662 persons. Moreover, Sandy Springs was not incorporated, received all of its governmental services from either Atlanta or Fulton

County, and many of the Sandy Springs civic organizations listed Atlanta addresses." *FCC Order I*, 16 FCC Rcd at 19857 ¶2 (JA 22-23). By contrast, the Commission pointed out, the College Park allotment met the established criteria "with respect to suburban communities seeking allocation of a first local service," would reduce existing interference to two short-spaced stations and would create no new interference. *Id.* Small's brief offers no coherent response to the Commission's clear explanation.

The *Eatonton* ruling did not hold generally, as Small claims (Br. at 33) that "WNNX's Anniston station cannot be relocated to Atlanta …." It simply denied the specific reallocation proposal at issue there. The College Park proposal, as the Commission noted, is a different proposal that involves different communities and different, decisionally-significant facts that lead to a different conclusion. For the same reason, Small's contention (Br. at 33) that some unexplained form of collateral estoppel precluded WNNX from even filing a rule making petition seeking the reallotment to College Park and two other communities is baseless.

The Commission properly described as "frivolous" Small's contention that his discussion of the 1991 *Eatonton* ruling in his December 2001 reconsideration petition involved new facts or changed circumstances. *See FCC Order II*, 17 FCC Rcd at 14830 ¶2 (JA 24). As WNNX observed in its opposition to Small's reconsideration petition, "[g]ranting Small's requests would extend the vicious circle that Small has caused throughout this case: Small makes an unsound, unsupported, even nonsensical, claim; the Commission answers it to assure completeness of the record; and Small then uses the FCC answer as a pretextual 'new development' to petition for reconsideration or reopening of the record." JA 403.

The Commission's different responses to the proposal in *Eatonton* and to the proposal for the College Park allotment in this case is a concrete demonstration of the agency's repeated warning to licensees that it "will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallot its channel to a suburban community in or near an Urbanized area." *R&O*, 15 FCC Rcd at 9973 ¶7 (JA 12). Although the *Eatonton* and College Park proposals may have appeared superficially similar, the Commission rationally explained in this case, based on established precedent, why the two proposals called for different conclusions. Contrary to Small's argument, the *Eatonton* precedent supports rather than undermines the Commission's action here.

Small's related assertion (Br. at 34) that the Commission improperly failed to take into account WNNX's application for a more powerful class of station for the College Park allotment is equally baseless. The critical factor, as even Small seems to recognize, was College Park's independence from Atlanta. The class of radio station assigned to College Park has nothing to do with that analysis. Moreover, as WNNX pointed out, Small had ample opportunity to challenge the application to change the class of station directly and had not done so. *See* JA 404-05. WNNX's application to change the class of station allotted to College Park, which was eventually granted by the Commission in June 2004, was irrelevant to the eligibility of College Park for a first local service preference and did not present new facts or changed circumstances that warranted consideration by the Commission.

### *C. The Due Process, Threatened Litigation And Ex Parte Claims*

Small raises several issues in his brief without providing any meaningful discussion. The Court has held on many occasions that it will not consider bare issues that are

presented in a brief without any substantial discussion. *See, e.g., Competitive Tel. Ass'n v. FCC*, 309 F.3d 8, 17 (D.C.Cir. 2002); *Bradley Mining Co. v. EPA*, 972 F.2d 1356, 1361 (D.C.Cir. 1992); *Railway Labor Ass'n v. United States Railroad Ret. Bd.*, 749 F.2d 856, 859 n.6 (D.C.Cir. 1984). Moreover, failure to argue an issue in an opening brief amounts to a waiver, and the argument will not be considered even if clearly presented in the reply brief. *Echostar Comm. Corp. v. FCC*, 292 F.3d 749, 754 (D.C.Cir. 2002); *Golden Pacific Bancorp v. Clarke*, 837 F.2d 509, 513 (D.C.Cir.), *cert. denied*, 488 U.S. 890 (1988). Nevertheless, we provide the Court with the following responses to several of those arguments.

1. Small claims that his due process rights were violated because he "was denied an opportunity to present his entire case …." (Br. at 8). This contention arises from Small's assertion that it was improper for the Mass Media Bureau to refer his second petition for Bureau reconsideration (JA 333) to the Commission. It is difficult to take this contention seriously. As the Commission pointed out, and as we have noted above, the Commission's rules expressly provide for such a procedure. *See* n. 7 above. Moreover, as the Commission noted, the rules do "not create an opportunity for the filing of an additional pleading or 'supplement.' Neither our rules of practice nor other policies authorize such filing." *FCC Order II*, 17 FCC Rcd at 14830 ¶2 (JA 24). The Commission's actions here were fully in accordance with its rules, and Small does not appear to contend that the rule itself is unconstitutional.

Although there is nothing unusual about the application of the Commission's rules to the facts of this case, to the extent that Small is claiming that the rule was unconstitutionally applied here to deprive him of some due process right to present his case to the

Commission, the claim is frivolous on its face. Small filed comments and a counterproposal, as well as two reply comments following the *Notice of Proposed Rule Making*. He filed a petition for reconsideration and a reply following the *Report and Order* of the Mass Media Bureau. Following the denial of that petition for reconsideration (JA 18), he filed a further petition for reconsideration and reply (JA 307, 361), which was acted upon by the Commission. Thus, putting aside Small's two petitions for reconsideration and related pleadings directed to the Commission, it is difficult to imagine what Mr. Small might have to say about his case that could not have been presented in these seven lengthy pleadings that were accepted by the Commission and fully addressed in two staff orders and the first Commission order.

Small asserts that due process requires "'notice and a meaningful opportunity to challenge the agency's decision ….'" Br. at 18, *quoting Amoco Production Co. v. Fry*, 118 F.3d 812 (D.C.Cir. 1997). Assuming that means he has a due process right to file pleadings in an administrative rule making proceeding, Small completely fails to show that he was not given an ample opportunity to present to the Commission in this proceeding whatever facts and arguments he deemed relevant.

2. Small also offers several unexplained references to "a suit filed against him seeking to force his withdrawal from the rulemaking …." Br. at xxx; *see also* Br. at 34. The Commission rejected this convoluted allegation, first presented by Small in his second reconsideration petition, which claimed that the <u>former</u> licensee of WHMA (which was not a party to this rule making proceeding), had threatened him with civil litigation if he continued to "to litigate the rulemaking proceeding." *See* Record App. to Resp. Brief at 1. Small alleged that this "threat" was "an abuse of the Commission's

processes," although he offered no explanation how that could be since the claimed threat was to initiate state court litigation that did not involve the Commission's processes at all by a party who was not a participant in this rule making proceeding. *See* JA 476. Moreover, Small did not allege that WNNX had any role in this threat, and WNNX expressly denied that it had any role. *See* JA 498. The Commission reasonably concluded that Small's allegations warranted no action, noting that "Small has failed to establish any nexus between" the facts supporting the allegation, such as they were, and any party to this rule making proceeding. *FCC Order III,* 19 FCC Rcd at 1604 ¶2 (JA 27).[25]

3. Finally, Small appears to contend in his statement of issues that his "Due Process rights were violated … when the FCC permitted *ex parte* communications." Br. at xxx. Although he repeats his factual allegations from the record in his statement of facts (Br. at 5), his 32 pages of argument contain no additional discussion of the *ex parte* claims so it is difficult to know precisely how the Commission's treatment of these claims involved error at all, much less error rising to a constitutional violation. Small made two complaints regarding *ex parte* communications below. In neither case, to be clear, did the Commission "permit" *ex parte* communications as Small claims.

In October 2002, Small complained to the Commission that counsel for WNNX had filed a petition for reconsideration in a separate agency proceeding that constituted *ex parte* communications because it made reference to the College Park proceeding. *See*

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[25] Small filed a motion with the Court moving to hold this case in abeyance because of the same state court litigation that gave rise to the "threat" allegation. *See* "Motion to Hold Case in Abeyance," D.C.Cir. No. 04-1056 (April 7, 2004). The Court denied that motion, finding that Small had "failed to demonstrate a sufficient likelihood that the outcome of that litigation will have a material effect on this case." *Order,* D.C.Cir. No. 04-1056 (June 29, 2004).

"Motion for Leave to Submit Information Concerning An Improper *Ex Parte* Communication," filed by Preston Small (Oct. 30, 2002). Small also complained in pleadings filed in the separate proceeding. The Commission ruled there that WNNX's filing had not constituted a violation of the *ex parte* rules. *See Auburn, Northport, et al., Alabama*, 18 FCC Rcd 10333, 10341 ¶25 (MB 2003). Small did not seek any further review of that ruling. In this proceeding, the Commission rejected Small's *ex parte* claim as well, expressing its agreement with the ruling in *Auburn, Northport*. *See FCC Order III*, 19 FCC Rcd at 1604 ¶2 (JA 27).

Small also complained that WNNX's counsel had attempted "to influence the outcome of this restricted rulemaking proceeding through the use of *ex parte* political influence." "Complaint and Request for Investigation" at 1, filed by Preston Small (Oct. 29, 2003). The complaint arose from a letter of Oct. 8, 2003 from Senator Richard Shelby to the FCC Chairman asking the Commission to take action in the Anniston-College Park proceeding because the Commission's delay was adversely affecting several of his constituents who are owners of radio stations in Alabama and whose efforts to make modifications in their own stations were contingent on the resolution of the Anniston-College Park proceeding.

Pursuant to established FCC procedures, the Commission's General Counsel advised the Senator that the proceeding was restricted, which required that communications such as his be served on all parties, that copies of his letter had been sent to the other parties in the proceeding and that his letter had been placed in a public file associated with, but not made a part of, the record in this proceeding. *See* JA 508.

WNNX's counsel specifically denied any contact with Senator Shelby's office or involvement in the letter's preparation. *See* "Response to Complaint," filed by Mark Lipp (Nov. 6, 2003). Noting that Small's complaint was based "entirely on speculation" and that "the Shelby letter was not considered," the Commission found "no basis for further consideration of this matter." *FCC Order III*, 19 FCC Rcd at 1603 n.3 (JA 26).

The Commission's action with respect to both of the *ex parte* allegations was reasonable and should be affirmed. Small's failure to specify any basis for his bare and conclusory assertion that the Commission erred in denying his *ex parte* complaints is reason in itself to deny his petition for review insofar as it challenges the Commission's rejection of those complaints.

## CONCLUSION

For the foregoing reasons, the Court should dismiss the notice of appeal and the petition for review for lack of jurisdiction. If the Court determines that it has jurisdiction, it should deny the petition for review and affirm the Commission's orders.

Respectfully submitted,

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February 7, 2005

**In The**
**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|---|---|---|
| PRESTON W. SMALL, | ) | |
| APPELLANT/PETITIONER | ) | |
| | ) | |
| v. | ) | **Nos. 04-1056; 04-1057** |
| | ) | |
| FEDERAL COMMUNICATIONS COMMISSION | ) | |
| AND THE UNITED STATES OF AMERICA | ) | |
| APPELLEE/RESPONDENTS | ) | |

## CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and D.C. Cir. Rule 32(a)(2), I hereby certify that the accompanying "Brief for FCC and United States" in the captioned case contains **13,815** words as measured by the word count function of Microsoft Word 2002.

C. Grey Pash, Jr.

March 28, 2005

# STATUTORY APPENDIX

**UNITED STATES CODE ANNOTATED**
**TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES**
**PART I--THE AGENCIES GENERALLY**
**CHAPTER 7--JUDICIAL REVIEW**

## § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

## § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

**(1)** compel agency action unlawfully withheld or unreasonably delayed; and

**(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--

**(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

**(B)** contrary to constitutional right, power, privilege, or immunity;

**(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

**(D)** without observance of procedure required by law;

**(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

**(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**UNITED STATES CODE ANNOTATED**
**TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE**
**PART VI--PARTICULAR PROCEEDINGS**
**CHAPTER 158--ORDERS OF FEDERAL AGENCIES; REVIEW**

## § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

**(1)** all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

* * *

## § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

**(1)** the nature of the proceedings as to which review is sought;

**(2)** the facts on which venue is based;

**(3)** the grounds on which relief is sought; and

**(4)** the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

**UNITED STATES CODE ANNOTATED**
**TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS**
**CHAPTER 5--WIRE OR RADIO COMMUNICATION**
**SUBCHAPTER III--SPECIAL PROVISIONS RELATING TO RADIO**
**PART I--GENERAL PROVISIONS**

## § 307. Licenses

(a) Grant

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) Allocation of facilities

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * *

## § 309. Application for license

* * *

(j) Use of competitive bidding

(1) General authority

If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

(2) Exemptions

The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission--

**(A)** for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that--

**(i)** are used to protect the safety of life, health, or property; and

**(ii)** are not made commercially available to the public;

**(B)** for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or

**(C)** for stations described in section 397(6) of this title.

* * *

## § 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

**(1)** By any applicant for a construction permit or station license, whose application is denied by the Commission.

**(2)** By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

**(3)** By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

**(4)** By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

**(5)** By the holder of any construction permit or station license which has been modified or revoked by the Commission.

**(6)** By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

**(7)** By any person upon whom an order to cease and desist has been served under section 312 of this title.

**(8)** By any radio operator whose license has been suspended by the Commission.

**(9)** By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

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**§ 405. Petition for reconsideration; procedure; dsposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order**

**(a)** After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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**CODE OF FEDERAL REGULATIONS**
**TITLE 47--TELECOMMUNICATION**
**CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION**
**SUBCHAPTER A--GENERAL**
**PART 1--PRACTICE AND PROCEDURE**

Current through January 31, 2005; 70 FR 5037

**§ 1.106 Petitions for reconsideration.**

(a)(1) Petitions requesting reconsideration of a final Commission action will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding. Petitions for reconsideration of other interlocutory actions will not be entertained. (For provisions governing reconsideration of Commission action in notice and comment rule making proceedings, see § 1.429. This § 1.106 does not govern reconsideration of such actions.)

(2) Within the period allowed for filing a petition for reconsideration, any party to the proceeding may request the presiding officer to certify to the Commission the question as to whether, on policy in effect at the time of designation or adopted since designation, and undisputed facts, a hearing should be held. If the presiding officer finds that there is substantial doubt, on established policy and undisputed facts, that a hearing should be held, he will certify the policy question to the Commission with a statement to that effect. No appeal may be filed from an order denying such a request. See also, § § 1.229 and 1.251.

(b)(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present:

(i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

(3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

(c) A petition for reconsideration which relies on facts not previously presented to the Commission or to the designated authority may be granted only under the following circumstances:

(1) The facts fall within one or more of the categories set forth in § 1.106(b)(2); or

(2) The Commission or the designated authority determines that consideration of the facts relied on is required in the public interest.

(d)(1) The petition shall state with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed. The petition shall state specifically the form or relief sought and, subject to this requirement, may contain alternative requests.

(2) The petition for reconsideration shall also, where appropriate, cite the findings of fact and/or conclusions of law which petitioner believes to be erroneous, and shall state with particularity the respects in which he believes such findings and conclusions should be changed. The petition may request that additional findings of fact and conclusions of law be made.

(e) Where a petition for reconsideration is based upon a claim of electrical interference, under appropriate rules in this chapter, to an existing station or a station for which a construction permit is outstanding, such petition, in addition to meeting the other requirements of this section, must be accompanied by an affidavit of a qualified radio engineer. Such affidavit shall show, either by following the procedures set forth in this chapter for determining interference in the absence of measurements, or by actual measurements made in accordance with the methods prescribed in this chapter, that electrical interference will be caused to the station within its normally protected contour.

(f) The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4(b) of these rules, and shall be served upon parties to the proceeding. The petition for reconsideration shall not exceed 25 double spaced typewritten pages. No supplement or addition to a petition for reconsideration which has not been acted upon by the Commission or by the designated authority, filed after expiration of the 30 day period, will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor.

(g) Oppositions to a petition for reconsideration shall be filed within 10 days after the petition is filed, and shall be served upon petitioner and parties to the proceeding. Oppositions shall not exceed 25 double spaced typewritten pages.

(h) Petitioner may reply to oppositions within seven days after the last day for filing oppositions, and any such reply shall be served upon parties to the proceeding. Replies shall not exceed 10 double spaced typewritten pages, and shall be limited to matters raised in the opposition.

(i) Petitions for reconsideration, oppositions, and replies shall conform to the requirements of § § 1.49, 1.51, and 1.52 and shall be submitted to the Secretary, Federal Communications Commission, Washington, D.C., 20554.

(j) The Commission or designated authority may grant the petition for reconsideration in whole or in part or may deny the petition. Its order will contain a concise statement of the reasons for the action taken. Where the petition for reconsideration relates to an instrument of authorization granted without hearing, the Commission or designated authority will take such action within 90 days after the petition is filed.

(k)(1) If the Commission or the designated authority grants the petition for reconsideration in whole or in

part, it may, in its decision:

(i) Simultaneously reverse or modify the order from which reconsideration is sought;

(ii) Remand the matter to a bureau or other Commission personnel for such further proceedings, including rehearing, as may be appropriate; or

(iii) Order such other proceedings as may be necessary or appropriate.

(2) If the Commission or designated authority initiates further proceedings, a ruling on the merits of the matter will be deferred pending completion of such proceedings. Following completion of such further proceedings, the Commission or designated authority may affirm, reverse, or modify its original order, or it may set aside the order and remand the matter for such further proceedings, including rehearing, as may be appropriate.

(3) Any order disposing of a petition for reconsideration which reverses or modifies the original order is subject to the same provisions with respect to reconsideration as the original order. In no event, however, shall a ruling which denies a petition for reconsideration be considered a modification of the original order. A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious.

Note: For purposes of this section, the word "order" refers to that portion of its action wherein the Commission announces its judgment. This should be distinguished from the "memorandum opinion" or other material which often accompany and explain the order.

(l) No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or the designated authority believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section.

(m) The filing of a petition for reconsideration is not a condition precedent to judicial review of any action taken by the Commission or by the designated authority, except where the person seeking such review was not a party to the proceeding resulting in the action, or relies on questions of fact or law upon which the Commission or designated authority has been afforded no opportunity to pass. (See § 1.115(c).) Persons in those categories who meet the requirements of this section may qualify to seek judicial review by filing a petition for reconsideration.

(n) Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof. However, upon good cause shown, the Commission will stay the effectiveness of its order or requirement pending a decision on the petition for reconsideration. (This paragraph applies only to actions of the Commission en banc. For provisions applicable to actions under delegated authority, see § 1.102.)

(o) Petitions for reconsideration of licensing actions, as well as oppositions and replies thereto, that are filed with respect to the Wireless Radio Services, may be filed electronically via ULS.

**§ 1.420 Additional procedures in proceedings for amendment of the FM or TV Tables of Allotments.**

(a) Comments filed in proceedings for amendment of the FM Table of Allotments (§ 73.202 of this chapter) or the Television Table of Allotments (§ 73.606 of this chapter) which are initiated on a petition for rule making shall be served on petitioner by the person who files the comments.

(b) Reply comments filed in proceedings for amendment of the FM or Television Tables of Allotments shall be served on the person(s) who filed the comments to which the reply is directed.

(c) Such comments and reply comments shall be accompanied by a certificate of service.

(d) Counterproposals shall be advanced in initial comments only and will not be considered if they are advanced in reply comments.

(e) An original and 4 copies of all petitions for rule making, comments, reply comments, and other pleadings shall be filed with the Commission.

(f) Petitions for reconsideration and responsive pleadings shall be served on parties to the proceeding and on any licensee or permittee whose authorization may be modified to specify operation on a different channel, and shall be accompanied by a certificate of service.

(g) The Commission may modify the license or permit of an FM station to another class of channel or of a UHF TV station to a VHF channel in the same community in the course of the rule making proceeding to amend § 73.202(b), § 73.504(a) or § 73.606(b) if any of the following conditions are met:

(1) There is no other timely filed expression of interest, or

(2) If another interest in the proposed channel is timely filed an additional equivalent class of channel is also allotted, assigned or available for application, or

(3) With respect to FM, the modification of license or permit would occur on a mutually exclusive higher class adjacent or co-channel.

Note 1 to Paragraph (g): In certain situations, a licensee or permittee may seek an adjacent, intermediate frequency or co-channel upgrade by application. See Section 73.203(b) of this chapter.

Note 2 to Paragraph (g): The reclassification of a Class C station in accordance with the procedure set forth in Note 4 to § 73.3573 may be initiated through the filing of an original petition for amendment of the FM Table of Allotments. The Commission will notify the affected Class C station licensee of the proposed reclassification by issuing a notice of proposed rule making, except that where a triggering petition proposes an amendment or amendments to the FM Table of Allotments in addition to the proposed reclassification, the Commission will issue an order to show cause as set forth in Note 4 to § 73.3573, and a notice of proposed rule making will be issued only after the reclassification issue is resolved. Triggering petitions will be dismissed upon the filing, rather than the grant, of an acceptable construction permit application to increase antenna height to at least 451 meters HAAT by a subject Class C station.

(h) Where licensees (or permittees) of television broadcast stations jointly petition to amend § 73.606(b) and to exchange channels, and where one of the licensees (or permittees) operates on a commercial channel while the other operates on a reserved noncommercial educational channel within the same band,

and the stations serve substantially the same market, then the Commission may amend § 73.606(b) and modify the licenses (or permits) of the petitioners to specify operation on the appropriate channels upon a finding that such action will promote the public interest, convenience, and necessity.

Note 1 to Paragraph (h): Licensees and permittees operating Class A FM stations who seek to upgrade their facilities to Class B1, B, C3, C2, C1, or C on Channel 221, and whose proposed 1 mV/m signal contours would overlap the Grade B contour of a television station operating on Channel 6 must meet a particularly heavy burden by demonstrating that grants of their upgrade requests are in the public interest. In this regard, the Commission will examine the record in rule making proceedings to determine the availability of existing and potential non-commercial education service.

(i) In the course of the rule making proceeding to amend § 73.202(b) or § 73.606(b), the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment.

(j) Whenever an expression of interest in applying for, constructing, and operating a station has been filed in a proceeding to amend the FM or TV Table of Allotments, and the filing party seeks to dismiss or withdraw the expression of interest, either unilaterally or in exchange for financial consideration, that party must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the party withdrawing its interest nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the expression of interest;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the expression of interest.

(5) In addition, within 5 days of a party's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(i) A certification that neither it nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the party withdrawing its expression of interest; and

(ii) The terms of any oral agreement relating to the dismissal or withdrawal of the expression of interest.

### § 1.429 Petition for reconsideration.

(a) Any interested person may petition for reconsideration of a final action in a proceeding conducted under this subpart (see § § 1.407 and 1.425). Where the action was taken by the Commission, the petition will be acted on by the Commission. Where action was taken by a staff official under delegated authority, the petition may be acted on by the staff official or referred to the Commission for action.

Note: The staff has been authorized to act on rule making proceedings described in § 1.420 and is authorized to make editorial changes in the rules (see § 0.231(d)).

(b) A petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances:

(1) The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission;

(2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or

(3) The Commission determines that consideration of the facts relied on is required in the public interest.

(c) The petition for reconsideration shall state with particularity the respects in which petitioner believes the action taken should be changed.

(d) The petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of public notice of such action, as that date is defined in § 1.4(b). No supplement to a petition for reconsideration filed after expiration of the 30 day period will be considered, except upon leave granted pursuant to a separate pleading stating the grounds for acceptance of the supplement. The petition for reconsideration shall not exceed 25 double-spaced typewritten pages. See also § 1.49(f).

(e) Except as provided in § 1.420(f), petitions for reconsideration need not be served on parties to the proceeding. (However, where the number of parties is relatively small, the Commission encourages the service of petitions for reconsideration and other pleadings, and agreements among parties to exchange copies of pleadings. See also § 1.47(d) regarding electronic service of documents.) When a petition for reconsideration is timely filed in proper form, public notice of its filing is published in the Federal Register. The time for filing oppositions to the petition runs from the date of public notice. See § 1.4(b).

(f) Oppositions to a petition for reconsideration shall be filed within 15 days after the date of public notice of the petition's filing and need be served only on the person who filed the petition. See also § 1.49(d). Oppositions shall not exceed 25 double-spaced typewritten pages. See § 1.49(f).

(g) Replies to an opposition shall be filed within 10 days after the time for filing oppositions has expired and need be served only on the person who filed the opposition. Replies shall not exceed 10 double-spaced typewritten pages. See also § 1.49(d) and § 1.49(f).

(h) Petitions for reconsideration, oppositions and replies shall conform to the requirements of § § 1.49 and 1.52, except that they need not be verified. Except as provided in § 1.420(e), an original and 11 copies shall be submitted to the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties filing in electronic form need only submit one copy.

(i) The Commission may grant the petition for reconsideration in whole or in part or may deny the petition. Its order will contain a concise statement of the reasons for the action taken. Any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious.

(j) The filing of a petition for reconsideration is not a condition precedent to judicial review of any action taken by the Commission, except where the person seeking such review was not a party to the proceeding resulting in the action or relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. Subject to the provisions of paragraph (b) of this section, such a person may

qualify to seek judicial review by filing a petition for reconsideration.

(k) Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement. However, upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration. See, however, § 1.420(f).